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No. 97-1411

In The

Supreme Court of the United States

October Term, 1997

NORTH TEXAS STEEL COMPANY, INC.,

Petitioner,

vs.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Indiana

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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12 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THIS COURT HAS JURISDICTION TO REVIEW THIS ACTION 1

II. THERE WERE NO INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUPPORT THE DETERMINATION OF THE INDIANA COURT OF APPEALS 4

III. THE INDIANA SUPREME COURT'S DENIAL OF TRANSFER IS NOT CAUSE FOR THIS COURT TO REFUSE TO GRANT THE PETITION FOR WRIT OF CERTIORARI 5

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO DETERMINE THE OUTER LIMITS OF DUE PROCESS FOR THE PURPOSE OF PERSONAL JURISDICTION 6

V. CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).....1, 7, 8, 9

Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).....1, 2

CMMC v. Salinas, 929 S.W.2d 435 (Tex. 1996)..6, 7, 8, 9

Coleman v. Thompson, 501 U.S. 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)..... 4

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975).....1, 2

Kulko v. Superior Court of California, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978).....1, 2

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).....4, 5

Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980)..... 1

Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).....1, 2

World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)..... 1, 2, 7

STATUTES AND RULES

28 U.S.C. § 1257.....2, 3

28 U.S.C. § 1257(a) 1

U.S. S.Ct. Rule 13.1..... 6

I. THIS COURT HAS JURISDICTION TO REVIEW THIS ACTION

In Respondent's Brief in Opposition, respondent, R.R. Donnelley & Sons Company (hereinafter "Donnelley") contends that this Court lacks jurisdiction to review this appeal under 28 U.S.C. §1257(a) for the reason that it is not an appeal from a final judgment on the merits. Donnelley argues that none of the exceptions found in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975), apply to this appeal from the Indiana Court's denial of a Motion to Dismiss for lack of personal jurisdiction. In doing so, Donnelley either ignores or makes a quixotical attempt to distinguish a long line of cases wherein this Court has exercised jurisdiction over cases prior to a final resolution on the merits involving the issue of whether the exercise of personal jurisdiction over a non-resident defendant complied with the requirements of due process. *Asahi Metal Industry Company, Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

Indeed, in *Calder*, this Court specifically considered and rejected the argument asserted by Donnelley.

> "Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, we conclude that the judgment below is final within the meaning of [28 U.S.C. §1257]'." *Id.*, 465 U.S. at 789, n. 8.

Donnelley attempts to distinguish *Calder* and *Shaffer* on the grounds that in those cases the Court's decision was final and not subject to further review in the state court. However, Donnelley has wholly failed to state how the decision of the Indiana Court of Appeals, with the denial of transfer by the Indiana Supreme Court, is subject to further review in the Indiana courts.

Donnelley attempts to distinguish *Kulko* in *World-Wide Volkswagon* on the grounds that the jurisdictional issue in those cases were raised by the request for a writ of prohibition or writ of mandamus. That is clearly a distinction without a difference. No matter how the issue of personal jurisdiction was raised in the appellate courts of the jurisdiction at issue, the judgment is no more or less final. In those cases, as in this case, there had been no trial on the merits and the issue of personal jurisdiction would not be determinative of the merits of the action. Nevertheless, in each of those cases, this Court exercised its jurisdiction to review the state court's determination that it had personal jurisdiction over a nonresident defendant.

In short, it is well established by the precedent of this Court that this Court has jurisdiction under 28 U.S.C. §1257 to review final state court determinations of whether the court has personal jurisdiction over a non-resident defendant. Accordingly, this Court should not deny the Petition for Writ of Certiorari on that basis.

Donnelley next argues that jurisdiction in this case is not appropriate because the decision of the Indiana Court of Appeals was not a decision rendered by the highest court in Indiana in which a decision could be had. Donnelley argues, as it did in the Indiana courts, that North Texas Steel should have raised the issue of personal jurisdiction by the means of an original action for writ of mandamus, and not by way of a permissive interlocutory appeal. However, this argument was considered and rejected by the Indiana Court of Appeals, which held that this action was properly one to be considered by means of appeal, and not an original action. (Petition for Writ of Certiorari, Appendix, pp. A5-A7). Apparently, Donnelley would have this Court review the Indiana Court of Appeals' determination of an issue of Indiana appellate procedure. Clearly, such a review would not be appropriate under the guise that this Court lacks jurisdiction under 28 U.S.C. §1257.

For all of the foregoing reasons, jurisdiction over this appeal by this Court is appropriate.

II. THERE WERE NO INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUPPORT THE DETERMINATION OF THE INDIANA COURT OF APPEALS

Donnelley contends that the Petition for Writ of Certiorari should be denied because "the possibility exists" that the reason for the denial of discretionary review by the Indiana Supreme Court is that petitioner, North Texas Steel Company, Inc., (hereinafter "North Texas Steel"), mistakenly pursued its appeal via means of interlocutory appeal rather than by an original action. In support of this proposition, Donnelley cites *Coleman v. Thompson*, 501 U.S. 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). However, the Opinion of this Court in *Coleman* in no way supports Donnelley's argument. Indeed, a cursory review of *Coleman* makes clear that the "possibility" that the Indiana Supreme Court denied transfer on the basis of a procedural irregularity is not a sufficient reason for this Court to reject a petition for writ of certiorari.

In *Coleman*, this Court discussed the opinion in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), wherein this Court considered the issue of whether an ambiguous state court decision set forth an independent and adequate state law ground for the outcome. In *Michigan v. Long*, this Court established a conclusive presumption of jurisdiction in cases involving such ambiguous state court decisions.

> "When, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the

> face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040-1041, 103 S.Ct. at 3476.

Certainly, in this case, there is nothing in the Order denying the Petition for Transfer by the Indiana Supreme Court which would in any way indicate that transfer was denied on the basis that North Texas Steel should have filed an original action, rather than pursuing an interlocutory appeal. Accordingly, under *Michigan v. Long*, it must be conclusively presumed that the decision was based on federal grounds and that there is no independent and adequate state ground to support the decision.

III. THE INDIANA SUPREME COURT'S DENIAL ON TRANSFER IS NOT CAUSE FOR THIS COURT TO REFUSE TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Donnelley argues that if the Indiana Supreme Court did not decline review on the procedural ground that North Texas Steel should have filed an original action, then the Indiana Supreme Court must have concluded that the jurisdictional issue was not important enough to warrant transfer and, therefore, that this case lacks importance sufficient to warrant this Court's granting the Petition for Writ of Certiorari. However, the fact that the Indiana Supreme Court denied transfer in this case should have absolutely no bearing on whether the Petition for Writ of Certiorari is granted. Indeed, the rules of this Court clearly contemplate the filing and acceptance of a petition for writ of certiorari seeking review of a

judgment of a lower state court that is subject to discretionary review by the state court of last resort, where such discretionary review is denied. See, Rule 13.1 of the Rules of the Supreme Court of the United States. Accordingly, the fact that the Indiana Supreme Court refused its opportunity to exercise discretionary review over the judgment of the Indiana Court of Appeals, does not mean that this Court should deny the Petition for Writ of Certiorari in order to resolve the continuing conflict which has arisen in both the federal courts and the state courts concerning the stream of commerce theory of personal jurisdiction.

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO DETERMINE THE OUTER LIMITS OF DUE PROCESS FOR THE PURPOSE OF PERSONAL JURISDICTION

Donnelley contends that there are no cases in other jurisdictions reaching a contrary result and that this case is consistent with existing precedent. However, that is clearly not the case. For example, the opinion of the Indiana Court of Appeals in this case is in conflict with an opinion of the Texas Supreme Court in *CMMC v. Salinas*, 929 S.W.2d 435 (Tex. 1996). In *CMMC*, a small winery located in Texas ordered a wine press from an independent distributor of equipment used in the wine and juice industries. That distributor, in turn, ordered the wine press for the winery from a French manufacturer, instructing that manufacturer to wire the press for electrical use in the United States. The distributor instructed the French manufacturer to arrange for transport of that wine

press to Texas. The manufacturer complied and thus knew the destination of the press was Texas.

The French manufacturer sold wine production equipment primarily in Europe. It did not directly market or advertise its equipment in the United States, other than providing promotional material to its distributors. The distributors advertised the manufacturer's products, but the manufacturer did not specifically authorize or approve the ads. It manufactured and sold equipment in the United States, including a direct sale to another winery in Texas. However, the manufacturer had never had a place of business, distributor or representative in Texas or any other contact with Texas. The purchaser of the wine press did not have any direct contact with the manufacturer.

An employee of the Texas winery who injured his arm while cleaning the press filed a products liability action against the French manufacturer asserting strict liability and negligence claims. After the trial court dismissed the action for lack of personal jurisdiction, the Texas Court of Appeals reversed, holding that personal jurisdiction could be asserted against the French manufacturer solely on the basis of its knowledge that the wine press which it manufactured would be shipped to Texas. The Texas Supreme Court reversed, holding that asserting jurisdiction over the French manufacturer would be a violation of the due process clause.

In *CMMC*, the Texas Supreme Court considered the opinions of this Court in *Asahi* and *World-Wide Volkswagon* in reaching the conclusion that the exercise of

jurisdiction over the nonresident corporate defendant in that case would violate due process.

> "For now, we need not take sides in the *Asahi* debate over the stream of commerce doctrine because of the difference in the factual circumstances of that case and the one now before us. Asahi's products were regularly sold in California, only not by Asahi. CMMC's wine producing equipment did not regularly find its way to Texas. Neither CMMC nor KLR made any effort to market CMMC's equipment in Texas, other than by advertisements in magazines with national circulation. Hill Country Cellar's purchase was an isolated event. KLR did not contact Hill Country Cellars; Hill Country Cellars contacted KLR. Hill Country Cellars never had any contacts at all with CMMC. CMMC's mere knowledge that its winepress would be sold and used in Texas and its wiring the machine for use in the United States were not sufficient to subject CMMC to the jurisdiction of Texas courts. This evidence simply does not show that CMMC designed products for use in Texas, or that it made any effort to market them here, or that it took any other action to purposely avail itself of this market. Even Justice Brennan's view of the stream of commerce doctrine will not allow jurisdiction absent a 'regular and anticipated flow of products from the manufacturer to distribution to retail sale.' . . . There is no flow of products from CMMC to Texas; there is scarcely a dribble." *Id.*, at 439.

The Opinion of the Supreme Court of Texas in *CMMC* cannot be reconciled with the Opinion of the Indiana Court of Appeals in this action. As Donnelley notes in Respondent's Brief in Opposition, "the primary basis for

the decision is that North Texas Steel 'knew that the racks which it was fabricating were ultimately going to a distribution center for Donnelley, located in the State of Indiana.' " (Respondent's Brief in Opposition, p. 14). The issue in this case, as in *CMMC*, is whether knowledge that one's product is ultimately going to be utilized in the forum state, standing alone, is sufficient for the exercise of personal jurisdiction over a non-resident defendant consistent with the Due Process Clause. That was precisely the question left unanswered in *Asahi* and the question on which the courts of Indiana and Texas, as well as numerous other state and federal courts have differed.

V. CONCLUSION

For all of the foregoing reasons, and for those reasons set forth in the Petition for Writ of Certiorari, North Texas Steel's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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